ONG GUAN TECK & ORS.

v.

HIJJAS KASTURI

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[ORIGINATING MOTION NO. A. 31 OF 1981]
15 OCTOBER 1981

CIVIL PROCEDURE: *Arbitration - Application to remit award - Period to be extended; remission of matters relating to certain payments - Whether payments accounted for by the arbitrator - Arbitration Act 1952, ss. 23, 24 - Rules of the High Court 1980, O. 69(4)(1).*

The amended notice of originating motion sought to have the period of six weeks limited by O. 69(4)(1) of the Rules of the High Court 1980 for an application to remit an award under s. 23 of the Arbitration Act 1952, extended on the grounds given in the affidavit of the 1st and 4th applicants. The applicants also sought to remit matters relating to certain payments made and whether the payments were accounted for by the arbitrator.

The award concerned was made on 2 April 1981. An application by originating motion for extension of time was first made on 16 September 1981, five and a half months after the award was made and four months after the expiry of the period required by O. 64 r. 4 of the Rules of the High Court. The originating motion was subsequently amended on 12 October 1981.

The application raised two questions:

(1) Were there good reasons for the delay in making the application?

(2) Was there sufficient merit for the award to be remitted to the arbitrator?

Held:

[1] On the facts of the case, there was no valid reason for the delay. The applicants had stated in their affidavit that it was on 23 June 1981 that they first realised that there was a divergence between the parties regarding interpretation of the award. In fact, however, the applicants had in another proceeding, in their affidavit in reply to the application of the respondent for leave to enforce the same award, raised the same point about certain payments probably not being accounted for by the arbitrator, but had not asked that the award be remitted, but, merely requested clarification from the arbitrator before the award could be enforced.

The award itself had been made and published on 2 April 1981. The length of time that had lapsed between the award and the application for extension of time was a material factor to be considered. Though the Court has an unfettered discretion to grant or refuse an extension of time, the first principle is that rules of Court must *prima facie* be obeyed. In order to justify an extension of time, there must be some material on which the Court can exercise discretion in favour of the applicant, for otherwise the very purpose and object of the rules on limitation of period would be defeated if the applicant is permitted an unfettered right to extension of time.

[2] There was no merit in the application for remission. In their affidavit, the applicants had stated that they had "genuine doubt" whether the various amounts referred to by them had been taken into account by the arbitrator in coming to the figure referred to in the award.

But "doubts", however genuine, do not constitute sufficient ground to remit the award. Though s. 23 of the Arbitration Act 1952, which provides that the High Court may from time to time remit an award for the reconsideration of the arbitrator, seems to confer a wide discretion, the discretion is not unlimited. Section 24(2) provides that the Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or the award has been improperly procured. The decision of an arbitrator is binding both in matters of law and fact unless it is proved that the award is bad on the face of it or that there has been misconduct on the part of the arbitrator or that there has been an admitted mistake and the arbitrator asks that the matter be remitted or where additional evidence had been discovered after the making of the award (*Montgomery Jones & Co. v. Liebenthal & Co.* [1898] 78 LT 406; Digest 456, 2036; *Hodgkinson v. Fernie & Anor*. (ER 140 p. 712). An award may also be remitted if it is genuinely ambiguous or confusing or otherwise unclear (*Marqulies Brothers Ltd v. Dafins Thomaides & Co Ltd* [1958] All ER QBD 777). There was, however, nothing ambiguous, confusing or uncertain in the language of the arbitrator regarding the award in the present case, nor did the award contain any error on the face of it.

[The application was dismissed with costs.]

Cases referred to:
Hodgkinson v. Fernie & Anor. 140 ER 712
Montgomery Jones Co. v. Liebenthal & Co. [1898] 78 LT 406
Margulies Brothers Ltd. v. Dafnis Thomaides & Co. Ltd. [1958] 1 WLR 398; [1958] 1 All ER 777

Legislation referred to:
Arbitration Act 1952, ss. 23, 24, (2)
Rules of the High Court 1980, O. 69 r. 4(1)

For the applicants - I. de Silva; Chooi & Co.
For the respondents - K. Thayalan; Skrine & Co.

JUDGMENT

Hashim Yeop Sani J:

The amended notice of originating motion sought to have the period of 6 weeks limited by O. 69 r. 4(1) of the Rules of the High Court 1980 for an application to remit an award under s. 23 of the Arbitration Art 1952 extended on the grounds given in the affidavit of the 1st and 4th applicants. The applicants also sought to remit matters relating to certain payments made and whether the payments were accounted for by the arbitrator.

To get our perspective right let us first examine the relevant provisions of the Arbitration Act 1952. Section 23 of the Act provides that the High Court may from time to time remit an award for the reconsideration of the arbitrator. Section 24 of the Act *inter alia* provides that the High Court may set aside an award where it is satisfied that an arbitrator has misconducted himself or that the award has been improperly procured. Order 69 r. 4(1) of the Rules of the High Court 1980 provides that an application to remit an award under s. 23 of the Arbitration Act may be made within 6 weeks after the award has been made and published.

The award concerned was made on 2 April 1981 - Exhibit P10 attached to the affidavit of the applicants. The originating motion was first taken out on 16 September 1981 and subsequently amended on 12 October 1981. In other words, the application for extension of time in this case was made 5½ months after the award was made and 4 months after expiry of the period required by O. 69 r. 4 of the rules of the High Court 1980.

In the present application the applicants would have to satisfy the Court firstly that there were good grounds for the delay in making the application and secondly, there was sufficient merit for the award to be remitted to the arbitrator.

The reasons given in the affidavit of the applicants were that there was a divergence of opinion on, or interpretation of the award between the parties and this divergence or difference was according to the applicants first realised only on 23 June 1981 - see para. 27 of the affidavit dated 16 September 1981. Only after this realisation did the applicants feel that there was "genuine doubt" in their minds whether the various amounts paid by them as described in para. 15 of the affidavit had been taken into account by the arbitrator in his award. In my opinion it is in paras. 27 and 29 of the affidavit of the applicants that the real crux of the question in this case lies. For it is in these two paragraphs that the following propositions were crystallised:

(i) That the applicants realised for the first time on 23 June 1981 that their interpretation of the award was different from that of the respondent; and

(ii) The real ground behind their application for remitting the award was that they felt there was genuine doubt in their minds whether the various amounts referred to by them in para. 15 of the affidavit had been taken into account by the arbitrator.

It is to be noted, however, that the applicants had in another proceeding in OM A35 of 1981 in their affidavit in reply to the application of the respondent for leave to enforce the same award raised (in para. 5 of their affidavit dated 2 July 1981) the same point about certain payments probably not accounted for by the arbitrator. It may be pointed out that in the same affidavit in OM A35 of 1981 the applicants did not, however, ask that the award be remitted but merely requested clarification from the arbitrator before the award could be enforced.

It is also to be noted that in the affidavit of the applicants in OM A31 of 1981 and their affidavit in OM A35 of 1981 all the payments referred to were made on various dates in 1979 and 1980. In other words, these payments were all made before the date of the award i.e. 2 April 1981 although some payments were made after the statement of claim was filed. It is not disputed that the award itself was made and published on 2 April 1981. It is also admitted by the applicants in their affidavit that they knew of "the different interpretation" on 23 June 1981. In another affidavit sworn on 2 July 1981 they also referred to those payments which they thought probably not accounted for by the arbitrator. The applicants filed the notice of originating motion for extension of time on 16 September 1981.

It is trite law that the Court has an unfettered discretion to grant or refuse an extension of time. The first principle is that the rules of Court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period.

In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the Court exercising the discretion. On the facts of this case I was not able to honestly say that there was any valid ground for the delay and therefore refused the application for extension of time.

The next question was whether there was merit in the application to remit the award. In their affidavit the applicants stated that there was genuine doubt whether those payments referred to were accounted for by the arbitrator in coming to the figure referred to in para. 1(ii) of the award. During submission Counsel for the applicants described the award as "ambiguous or confusing". For convenience, para. 1(ii) of the award is reproduced below:

> (ii) RM697,146 (ringgit six hundred and ninety seven thousand one hundred and forty-six only) being the full and final settlement of all other claims (and counter-claim) herein.

As referred to earlier in the judgment s. 23 of the Arbitration Act 1952 seems to confer a wide discretion for the Court to remit an award. However, the power of the Court to set aside an award is limited and s. 24(2) of the Act provides that the High Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or the award had been improperly procured. The language of s. 24(2) would seem to be rather narrow and limited. In other words the power of High Court to set aside an award is restricted to cases where some form of dishonesty or bias is shown.

It has long been accepted that the decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact unless it is proved there has been fraud or corruption on his part or there be some mistake of law apparent on the face of the award. - See *Hodgkinson v. Fernie & Anor*. 140 ER 712. It has also been held as settled law as early as 1898 in *Montgomery Jones Co. v. Liebenthal & Co.* [1898] 78 LT 406 that the following grounds would constitute good grounds for the Court to remit an award, namely:

(1) that the award is bad on the face of it;

(2) that there has been misconduct on the part of the arbitrator;

(3) that there has been an admitted mistake and the arbitrator asks that the matter be remitted; and

(4) where additional evidence has been discovered after the making of the award.

However, as Diplock said in *Margulies Brothers Ltd. v. Dafnis Thomaides & Co. Ltd.* [1958] 1 WLR 398: [1958] 1 All ER 777 the Court is by no means limited to the 4 grounds referred to although " I should naturally hesitate before exercising my discretion to remit a case which does not come within any one of the four categories there approved.''

The award may properly be remitted if, for example, it is genuinely ambiguous or confusing or otherwise unclear as in *Margulies Brothers Ltd. v. Dafnis Thomaides & Co. Ltd.* case. In that case the award did not specify the sum to be paid although the method of calculating it was indicated and not in dispute. The applicants applied for the award to be remitted to the arbitrator, so that the amount to be paid to them could be computed and the award amended so as to become enforceable. It was held that on those facts it was clear that on the face of the award it was uncertain and therefore bad and a proper case for remission. I was, however, unable to come to the same conclusion on the facts of this case. There is nothing ambiguous, confusing or uncertain in the language of the arbitrator in para. 1(ii) of the award.

There is nothing to show that the award or any part of it, contains any error on the face of it. The applicants having "doubts'' however genuine, could not constitute sufficient ground to remit the award. In my opinion therefore there was no merit in the application for remission.

Accordingly the application was dismissed with costs.

Also found at [1982] CLJ 31